No. 87-558

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT R. HENN, J. ROBERT KELLY,
ROBERT W. HORAN and RICHARD H. LEHMAN,
Petitioners,

v.

NATIONAL GEOGRAPHIC SOCIETY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION OF RESPONDENT NATIONAL GEOGRAPHIC SOCIETY

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the court of appeals correctly held, as a matter of law, that the factual contentions asserted by petitioners, even if proven, would not establish that their early retirements were coerced in violation of the Age Discrimination in Employment Act.

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Respondent National Geographic Society (the "Society")[1] respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Seventh Circuit in this case.[2]

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[1] National Geographic Society is a corporation. It does not have a parent corporation and is not publicly held.

[2] The decision of the court of appeals is reported at 819 F.2d 824 and is reprinted in the Appendix to the Petition at pages A-1 to A-12. The Petition will be cited herein as "Pet. at ——."

COUNTERSTATEMENT

This case concerns a voluntary early retirement program offered by the Society. The lower courts held that the retirement program was valid, rejecting on motions for summary judgment petitioners' claims that the Society discriminated against them in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C.A. §§ 621-634 (West 1985 & Supp. 1987). Both courts examined the facts drawing all reasonable inferences favorable to petitioners. Those undisputed facts are as follows:

The Society offered the voluntary retirement program to all employees in its Advertising Division over age 55. Pet. at C-1. The retirement program was offered, on the advice of the Society's pension consultants, as part of a plan to streamline and restructure the Advertising Division, which had experienced a sharp drop in revenues in the preceding year. *Id.* at C-3, D-4.[3]

The Society's President, Gilbert Grosvenor, wrote to the eligible employees on June 21, 1983, describing the enhanced retirement benefits being offered to those who elected to retire.[4] Grosvenor's letter emphasized repeatedly the voluntary nature of the offer and granted eligible employees more than two months, until September 1, 1983, to decide whether to accept the offer.[5] The Society did not encourage any employee to accept the offer; instead, each offeree was told that his decision was a per-

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[3] *See also* Letters of June 21, 1983, from Gilbert Grosvenor, President of the Society, to eligible employees (hereinafter "Grosvenor Letters"); Defendant's Requests for Admissions ¶¶ 18-19 and Plaintiffs' Response to Requests for Admissions ¶¶ 18-19 (hereinafter "Adm. ¶ ——").

[4] Adm. ¶ 30. These benefits included a special supplemental payment of one year's salary, retirement benefits calculated without any actuarial reduction for early retirement, and extra medical and life insurance coverage. Pet. at C-1 to C-2.

[5] *See* Grosvenor Letters.

sonal one.[6] Human resource and pension executives were made available to discuss the benefit plan with offerees, and some eligible employees also consulted with personal financial advisors.[7]

Fifteen Society employees were eligible for the retirement program. Pet. at C-1. Three declined the offer; all of them are still employed by the Society. *Id.* at C-2. Twelve employees—including the four petitioners in this case—accepted the benefits offer and submitted forms electing to retire, effective September 1, 1983. *Id.*

Petitioners did not feel pressured to accept the offer when they received it. Petitioner Henn, manager of the Chicago office, admitted that, although advertising revenues for that office had dropped precipitously in 1982 and had not improved in 1983, "he felt he was free to accept or reject the offer."[8] Henn admitted that no one at the Society ever suggested that he accept the offer and that he decided to elect the benefits after consulting with both the Society's employee benefits experts and his personal financial advisor.[9]

Like Henn, petitioner Kelly, who was Promotion Director for the Advertising Division and based in New York, admitted that no one at the Society encouraged or pressured him to take the early retirement offer.[10] Kelly also consulted with an outside financial advisor and then decided well in advance of the deadline to elect early retirement.[11]

Petitioner Horan, an advertising sales representative, had experienced a decline in sales performance since 1930

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[6] Pet. at C-3, D-4; Adm. ¶¶ 63, 128-29, 182, 184-85, 242-46.

[7] Adm. ¶¶ 41, 45-47, 118, 170, 178, 181, 237, 241, 247.

[8] Adm. ¶¶ 17-18, 21-22, 37, 58.

[9] *Id.* ¶¶ 63, 41-43, 45-47.

[10] *Id.* ¶¶ 240-43, 246.

[11] *Id.* ¶¶ 247-48.

and had consistently failed to meet his sales quota.[12] Despite these difficulties, Horan viewed the early retirement proposal as voluntary when he elected to accept it, and he admitted that no one at the Society encouraged him to accept it.[13] When Horan initiated a discussion of the retirement program with his superior, the Division head, it was emphasized that the decision was his alone.[14]

Petitioner Lehman was Los Angeles Regional Manager with sales account as well as managerial responsibilities. Both that office and Lehman individually were criticized for failure to meet sales quotas in 1982 and periodically through the first half of 1983.[15] In mid-1983, Lehman's performance was rated as "below average," and he had achieved only 43 percent of his quota. Given these problems, Lehman consulted with senior management of the Society after receiving the early retirement offer in June to determine what course he should follow.[16] Not one of these officers—including Society President Grosvenor—ever encouraged Lehman to accept the offer.[17]

Since their retirements, petitioners have received all the benefits promised by the Society.[18] However, nearly a year after their decision to accept early retirement benefits, on June 18, 1984, petitioners filed suit against the Society in the United States District Court for the Northern District of Illinois, Eastern Division. Petitioners alleged that the Society's offer of an early retirement program violated the ADEA. Petitioners contended that by not urging them to *reject* the early retirement plan

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[12] *Id.* ¶¶ 92-93, 103, 110.

[13] *Id.* ¶¶ 116-21.

[14] *Id.* ¶¶ 127-29.

[15] *Id.* ¶¶ 151-58, 163.

[16] *Id.* ¶¶ 170, 178.

[17] *Id.* ¶¶ 171-72, 178, 181-85.

[18] *Id.* ¶¶ 68, 133, 195, 268.

and by commenting on their failure to satisfy work performance standards the Society had forced petitioners to retire, in violation of the ADEA.

The trial court granted summary judgment against each petitioner.[19] The court held that to establish a prima facie case petitioners had to show that their working conditions were so intolerable that they had been constructively discharged. Pet. at C-3. Based on its review of the record, the trial court determined that petitioners had produced "absolutely no evidence of 'intolerability of working conditions' so as to justify any finding of constructive discharge." *Id.*; *see also id.* at D-4. The court observed that advertising was a high pressure profession and that petitioners' fears that they might lose their jobs if they failed to satisfy performance standards did not make their jobs intolerable. *Id.* at C-4, D-4.

The court of appeals affirmed. It held that "[e]ach person's decision to retire was his own, and any pressure he felt was a product of the downturn in sales and the risks of a salesman's job." *Id.* at A-2.

REASONS FOR DENYING THE WRIT

The decision of the court of appeals is a straightforward application of this Court's holding in *Celotex Corp. v. Catrett*, 106 S. Ct. 2548 (1986). There the Court held that "the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Id.* at 2552-53. In this case that element is whether petitioners' retirements were coerced. No question is raised by this case as to the standard by which voluntariness of

[19] The trial court's decision of March 12, 1986, granted summary judgment against petitioners Henn and Kelly. Pet. at C-1 to C-5. The trial court's second decision, dated September 2, 1986, granted summary judgment against petitioners Horan and Lehman. *Id.* at D-1 to D-4.

retirement is to be judged. Moreover, the court of appeals' application of that standard to the facts, and its correct determination that those facts were insufficient to show that petitioners' retirements were coerced, raise no significant issues of federal law. This case thus does not warrant grant of a writ of certiorari.

I. THIS CASE DOES NOT PRESENT AN ISSUE AS TO THE PROPER STANDARD FOR CONSIDERING THE LAWFULNESS OF VOLUNTARY EARLY RETIREMENT PROGRAMS UNDER THE ADEA

The court of appeals' conclusions as to whether petitioners could support their claim of constructive discharge were concisely stated: petitioners' evidence simply did not give rise to a reasonable inference that their retirements were coerced. Pet. at A-11. Petitioners attempt to transform this routine factual determination into a question of substantial legal significance, seeking this Court's review of the standards for the lawfulness of voluntary early retirement programs and for constructive discharge. No such issues are raised by this case.

The court of appeals held, consistent with the decisions of other circuits, that early retirement programs are valid when they are voluntary. Petitioners thus err in contending that the court of appeals imposed a divergent standard under which every early retirement program is valid as a matter of law. The court of appeals further held that *whatever* standard is used to determine the voluntariness of the offer, the evidence in this case did not present a triable issue of fact as to voluntariness. The court of appeals did not, as petitioners claim, impose a stringent new standard in conflict with decisions of the other circuits. Nor did the court of appeals require petitioners to establish that their employment would have been terminated had they not elected to retire. Instead, the court of appeals properly applied existing law regarding voluntary early retirement programs and constructive discharge in granting summary judgment.

A. No Conflict Is Presented as to the Validity of Voluntary Early Retirement Programs

An early retirement program, when offered without coercion to accept it, is lawful. The courts of appeals consistently have approved as valid under the ADEA early retirement programs that operated in a manner similar to that offered by the Society.[20] Moreover, the Equal Employment Opportunity Commission has promulgated regulations that expressly recognize the validity of voluntary early retirement programs.[21]

Petitioners erroneously suggest that the court of appeals' decision is in conflict with this line of cases. They mischaracterize that decision as holding that *every* early retirement is a "boon" as a matter of law. *See* Pet. at 14-16. The court did not so hold. Instead, while noting that in general an offer of incentive to retire early is a benefit to the recipient, the court of appeals held that the offer must be voluntary. *Id.* at A-6. "Voluntariness" was held by the court of appeals to be a factual issue turning on such factors as the absence of fraud, the opportunity to decline the offer, the time allotted for making the choice, and the information received about the offer. *Id.* at A-7. The court of appeals did not hold that any early retirement program—voluntary or not—was valid as a

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[20] *See, e.g., Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 255 (1st Cir. 1986); *Coburn v. Pan Am. World Airways*, 711 F.2d 339, 344 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983); *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 71 (6th Cir. 1982); *Toussaint v. Ford Motor Co.*, 581 F.2d 812, 815 (10th Cir. 1978).

[21] 29 C.F.R. § 1625.9(f) (1987) provides:

> Neither section 4(f)(2) [29 U.S.C. § 623(f)(2) (1982)] nor any other provision of the Act makes it unlawful for a plan to permit individuals to elect early retirement at a specified age at their own option.

matter of law, and its ruling is thus consistent with those of every other circuit considering the issue.[22]

Nor did the court of appeals improperly ignore the context in which the Society made its early retirement offer. *See* Pet. at 11-12. Petitioners object to the court's statement that "the appropriate question in early retirement cases [is] whether the existing conditions (ignoring the offer of early retirement) violate the ADEA." *Id.* at A-8. Petitioners assert that this statement evidences the court of appeals' approval of early retirement programs *per se*, without refererence to the circumstances in which they are offered. *Id.* at 11-12.

The court's clear point, however, is that, given the fact that a *voluntary* early retirement program is lawful, to demonstrate constructive discharge the employee must show something apart from the fact that there was a retirement offer that renders the employer's conduct unlawful. As the court expressly noted, employer conduct that amounted to constructive discharge of the employee would give rise to an ADEA claim whether or not the employee elected to accept the early retirement offer. *Id.* at A-8. The court of appeals thus recognized that the appropriate inquiry in this case was whether petitioners could support their claim of constructive discharge.

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[22] The court of appeals did express its disagreement with the initial decision of the Second Circuit in *Paolillo v. Dresser Indus.*, published in advance sheets at 813 F.2d 583 (2d Cir. 1987). That court initially held that an offer of early retirement creates a prima facie case of age discrimination, which the employer must rebut. *See* Pet. at A-2. As petitioners acknowledge, however, the *Paolillo* panel subsequently withdrew its decision. 821 F.2d 81 (2d Cir. 1987). Consistent with the decisions of the other circuits, the final *Paolillo* decision treated the voluntariness of early retirement as a factual question and assigned to the employee the obligation to show that his retirement was coerced. *Id.* at 84. Thus, no conflict now exists among the courts of appeals on this point.

B. No Conflict Is Presented as to Determination of Constructive Discharge

Petitioners assert that the courts of appeals are in disarray on the issue of constructive discharge and that the court of appeals in this case added "not only another standard, but one so excessively onerous as to require the demonstration of savagery." Pet. at 17. Neither contention is true.

As to the purported conflict in the circuits, the courts of appeals have unanimously held that, at the very least, the employee must demonstrate that his working conditions were so intolerable that a reasonable person in the employee's position would have felt compelled to resign.[23] Some circuits have imposed a second, stricter standard in addition to the reasonable person test, under which the employee must also demonstrate that his employer deliberately made his working conditions intolerable, forcing him to quit his job.[24] However, this variation in the circuits' approach to constructive discharge does not constitute a significant "disarray" warranting this Court's intervention.

In any event, the purported "conflict" is not at issue in this case. Both courts below expressly applied the minimum standard adopted by other courts of appeals and advocated here by petitioners. *See* Pet. at 18 (citing *Bourque v. Powell Mfg. Co.*, 617 F.2d 61, 65 (5th Cir.

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[23] *See, e.g., Guthrie v. J.C. Penney Co.*, 803 F.2d 202, 207 (5th Cir. 1986); *William v. Caterpillar Tractor Co.*, 770 F.2d 47, 49 (6th Cir. 1985); *Buckley v. Hospital Corp. of Am.*, 758 F.2d 1525, 1530-31 (11th Cir. 1985); *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir. 1977); *see generally* Comment, *Constructive Discharge Under Title VII and the ADEA*, 53 U. Chi. L. Rev. 561, 563 (1986).

[24] *See, e.g., Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 1461 (1986); *Muller v. United States Steel Corp.*, 509 F.2d 923, 929 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975).

1980)). The district court required petitioners to show that "a 'reasonable person' in the employee's position would have felt compelled to resign." *Id.* at C-3 (citing *Bourque*, 617 F.2d 61).[25] The court of appeals approved the application of the less stringent standard. *Id.* at A-8 to A-9. As petitioners concede, *id.* at 17 n.24, the court of appeals expressly declined to decide whether to adopt the stricter, two-part test. *Id.* at A-9. It did so because under any articulation of the standard petitioners' evidence was insufficient to raise a genuine issue for trial. *See id.* at A-11.

Petitioners' erroneous assertion that the court of appeals applied a uniquely onerous standard in this case is based on a single isolated sentence of the decision. In the context of determining whether petitioners' decisions to elect early retirement were voluntary, the court of appeals explained that a difficult choice between two desirable options—continued employment and early retirement—did not make the program involuntary. *Id.* at A-7. To underscore this point, the court of appeals observed that petitioners "could prevail only by showing that the Society manipulated the options so that they were driven to early retirement not by its attractions but by the terror of the alternative." *Id.* at A-7 to A-8. Despite this language, however, the court of appeals did not hold petitioners to such a showing. Instead, it tested petitioners' evidence by the minimum applicable standard and found it patently insufficient. *Id.* at A-9 to A-11.

Petitioners' final argument concerning the legal standard applied in this case is a fabrication. They complain that they were required to prove they would have been fired had they not elected to retire. *Id.* at 12-13. No such requirement was imposed by the courts below. In

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[25] The district court also referred to the stricter, two-part standard. *Id.* at C-3 (citing *Bristow*, 770 F.2d at 1255). However, the district court clearly did not apply the stricter standard, *id.* at C-3 to C-5, D-2 to D-4, nor do petitioners claim here that it did so.

evaluating petitioners' evidence, the court of appeals stated that the "reasonable inferences from this record would not allow a jury to infer that the plaintiffs would have been fired (in violation of the ADEA) had they turned down the offer of early retirement." *Id.* at A-11. This statement responds to petitioners' *own* arguments to the court of appeals regarding the sufficiency of the evidence, in which they contended that their decisions to retire were coerced because they feared they would be fired if they declined to take early retirement.[26] The court of appeals was not applying an additional, onerous standard, but merely commenting on petitioners' evidence and the inferences *they* believed it supported.

Petitioners ground their arguments to this Court on isolated statements of the court of appeals taken out of context. However, "[t]his Court . . . reviews judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956). The judgment here raises no issue as to applicable legal standards, and the petition should therefore be denied.

II. SUMMARY DISPOSITION OF THIS CASE WAS APPROPRIATE

The lower courts' evaluation of the evidence under the proper legal standard is a fact-based question that does not warrant review by this Court. In any event, summary disposition of this case was required by this Court's decision in *Celotex*, because petitioners failed to support their constructive discharge claim.

Indeed, the trial court found after careful review of the record that petitioners had proffered "absolutely no evidence of 'intolerability of working conditions' so as to justify any finding of constructive discharge." Pet. at C-3. The district court's conclusions were well founded. It relied throughout both opinions upon unequivocal ad-

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[26] Brief on Behalf of Plaintiffs-Appellants at 29.

missions made by petitioners in response to Requests for Admissions filed by the Society pursuant to Rule 36 of the Federal Rules of Civil Procedure. Those factual concessions were totally at odds with petitioners' constructive discharge claim. *See id.* at A-9.

Petitioners' effort to demonstrate intolerability of working conditions had two basic themes. First, petitioners complained that, having offered its early retirement plan, the Society "remained silent," failing to urge petitioners *not* to accept its offer. *Id.* at C-3 to C-4, D-2, D-3. Petitioners all conceded, however, that they felt no pressure to accept the early retirement offer when they received it, that the terms of the offer made clear that it was voluntary, and that no one at the Society ever pressured them to accept the offer.[27] Indeed, petitioners conceded that the three eligible Advertising Division employees who elected not to take early retirement remain employed by the Society. Pet. at C-3.

The courts below recognized that there is no obligation on employers who offer early voluntary retirement also to discourage acceptance of it. *Id.* at A-9, A-11, D-3.[28] As those courts correctly held, no reasonable person would conclude that working conditions were intolerable because the Society objectively presented its retirement offer and left the decision to accept or decline entirely up to the employee.

Petitioners' second theme was that they were under pressure to achieve work performance standards within the Advertising Division. Petitioners made no effort to establish that these performance pressures were in any

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[27] Adm. ¶¶ 34, 36, 43, 63, 116-17, 120-21, 171-72, 178, 193, 234, 236, 246.

[28] In fact, even urging acceptance of an early retirement offer (a factor that plaintiffs concede was not present here) may not constitute constructive discharge. *See Bristow*, 770 F.2d at 1256; *Ackerman*, 670 F.2d at 68, 69.

sense age-based. The district court noted,[29] and the court of appeals agreed,[30] that performance pressures are common in the advertising business. "Selling is a risky profession, and it does not make a salesman's job unbearable to remind him that he must produce and that there are penalties for failure." *Id.*[31] The evidence on which petitioners rely is thus totally insufficient to give rise to an inference of intolerable working conditions.

For example, petitioner Horan grounds his claim of constructive discharge in part upon critical performance memoranda written by his supervisor. However, Horan—who failed to achieve his quotas for three consecutive years—made no claim that the criticisms were inaccurate or unwarranted and no showing that they were in any way connected with his age. *See* Pet. at D-2 to D-3.[32] Moreover, Horan candidly conceded that he was not singled out for criticism, but that other employees, including one who declined early retirement and remains employed by the Society, were similarly criticized for failure to meet performance standards.[33] Ultimately, Horan relies on his own subjective feelings that "young people

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[29] Pet. at C-4, D-4.

[30] *Id.* at A-9.

[31] Many circuit court decisions confirm the correctness of this view. *See, e.g., Dale v. Chicago Tribune Co.*, 797 F.2d 458, 463 (7th Cir. 1986) (employee required to meet legitimate expectations of employer), *cert. denied*, 107 S. Ct. 954 (1987); *Dorsch v. L.B. Foster Co.*, 782 F.2d 1421, 1426 (7th Cir. 1986) (selection of employees to be retained on the basis of performance-related criteria appropriate); *Bristow*, 770 F.2d at 1255-56 (pressure created by larger size territory than that of other managers did not create intolerable working conditions).

[32] In any event, an employee's decision to quit his job because his performance evaluations are poor does not constitute constructive discharge. *Bristow*, 770 F.2d at 1255-56.

[33] *See* Adm. ¶ 82.

[were] being favored," drawn from his strained interpretation of conversational fragments. Pet. at F-8. Horan's subjective perceptions do not support a reasonable inference that his retirement was coerced.[34]

Similarly, petitioner Lehman's claims rested on statements allegedly made by his superior about his sales performance. However, Lehman failed to dispute this assessment of his work, and he admitted that he failed to meet his sales quotas in 1982 and was again significantly behind his quota when offered the early retirement opportunity in 1983. *See* Pet. at D-3 to D-4.[35] Lehman also alleged that a personality conflict with his supervisor, William Hughes, made continued employment untenable. Pet. at F-10 to F-13. The district court held, however, that "there is no demonstrated nexus between anything Hughes did and the intent, preparation and offering of the early retirement proposal." *Id.* at D-4. Thus, Lehman's personal difficulty with Hughes did not give rise to a reasonable inference of discrimination.[36]

Petitioner Henn made no claim of personal difficulties in connection with his job prior to the offer. His allegation of intolerable working conditions was based solely on a feeling that "he wasn't wanted." Pet. at C-4. Henn reached that conclusion when the Society did not accept

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[34] *See Kelleher v. Flawn*, 761 F.2d 1079, 1086 (5th Cir. 1985); *cf. Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981) (no constructive discharge where employee is "unreasonably sensitive to his working environment"). By definition, the "reasonable person" standard does not turn on an employee's subjective reaction to employment conditions, but on the reaction of a hypothetical "reasonable" employee in his position. *Guthrie*, 803 F.2d at 207.

[35] Although Lehman vaguely touted his "success" in 1983, Pet. at F-10 to F-11, he admitted in the district court proceedings that at the time the early retirement offer was made he was far behind his sales quota and that his performance was ranked "below average." Adm. ¶ 163; Pet. at F-12.

[36] *See Dale*, 797 F.2d at 465 n.9; *Ackerman*, 670 F.2d at 70.

his suggestion that the deadline for acceptance of the Division-wide early retirement offer be extended eighteen months for him alone. *Id.* The district court correctly determined that this evidence did not support an inference of intolerable working conditions. *Id.* at C-4 to C-5.

Kelly's evidence of forced retirement was virtually nonexistent. Kelly believed the Society was trying to "get[] rid of some of the older people," because Hughes—who was not even Kelly's supervisor—was very demanding of other employees. *Id.* at F-7 This "foreboding" clearly did not render Kelly's working conditions intolerable under an objective standard.

Although petitioners assert that the courts below failed to consider all the evidence, they do not identify a single item of material evidence that the courts did not consider. *See id.* at 20-21. Drawing every reasonable inference in petitioners' favor, the courts below correctly concluded that petitioners' evidence was insufficient to support their claim of constructive discharge. *Id.* at A-11, C-3, D-4. The most that can reasonably be inferred from that evidence is that petitioners had to choose between inevitable job tensions that all employees face and the immediate financial incentives of the voluntary early retirement offer. The admissions made by petitioners establish that the decision to retire was their own. They struck a bargain to relinquish their employment and accept the offer, the benefits of which they are now receiving. Review of the evidence by this Court is not warranted.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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